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European Border Security vs. Refugee Protection

The ability of the EU to protect refugees during the Arab Spring

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I. ACRONYMS AND ABBREVIATIONS

ASGI	Associazione per gli Studi Giuridici sull'Immigrazione
CARAs	Reception Centres for Asylum Seekers
CEAS	Common European Asylum system
CIEs	Centres for identification and expulsion
CoE	Council of Europe
EC	European Commission
ENP	European Neighbourhood Policy
EP	European Parliament
EU	European Union
Frontex	Agence européenne pour la gestion de la coopération opérationnelle aux frontières extérieures
HRW	Human Rights Watch
IOM	International Organization for Migration
JHA	Council of Justice and Home Affairs
NATO	North Atlantic Treaty Organization
NGO	Non Governmental Organization
PACE	Parliamentary Assembly of the Council of Europe
SAR zone	Search and Rescue zone
SIPRI	Stockholm International Peace Research Institute
SOLAS	International Convention for the Safety of Life at Sea
TFEU	Treaty on the Functioning of the European Union
UNHCR	Office of the United Nations High Commissioner for Refugees

ABSTRACT

The purpose of this research is to analyse and test EU border policy instruments designed to ensure refugee protection. While scholars have discussed the securitization of EU border policies and the negative consequences of this for the protection of refugees, a systematic examination of the instruments designed to ensure refugee protection is still missing. I posit that the EU's border policy instruments reflect a near-sighted attitude. Analyzing the instruments aimed at ensuring refugee protection, not only provides an insight into the weaknesses and strengths of each policy instrument, it will also show legislative gaps which allow EU member states to act in accordance with their national interest rather than EU border policy. Using data from policy papers, evaluation reports, and newspapers I outline the objectives and legal foundations of the instruments. I will then apply them to the case of the Arab Spring to test whether these instruments have lived up to their foundational objectives. The results suggest that the instruments of EU border policy were too weak to protect refugees.

Key words: Refugee protection, EU border policy, Arab Spring

INTRODUCTION

Since the first protest broke out in Tunisia in December 2010, a crescendo of transnational uprisings in the Arab world[1] captured the world's attention. These uprisings, which became referred to as the Arab Spring, became increasingly more violent and due to either the fear of prosecution and violence or simply the hope of finding an economically brighter future, people started fleeing from the Arab world to Europe (Al Jazeera 2011a). A year later the reaction of the European Commissioner for Home Affairs Cecilia Malmström - regarding the performance of the European Union (EU) member states dealing with the consequences of these developments - proclaimed that:

> 'particularly when it comes to dealing with the men, women, and children coming to Europe for protection or in search of a better life, European leaders have not been as supportive' (Cecilia Malmström, 2011a)

Several non-governmental organizations (NGOs) however, have emphasised that this statement, albeit a step in the right direction, is too mild. They stated that reception conditions were far below standard (HRW 2011:29) and that never before such a high number of migrants[2] had died in their attempt to reach European territory (UNHCR 2012). In contrast to Malmström, they state that not only the member states are to blame, but the EU as a whole because it has not provided the protection and assistance to refugees as stipulated in European law. They conclude that member states and the EU as a whole fell short in protecting refugees[3].

A well grounded assessment of causes explaining the failure has to date not been provided. Hitherto, one guiding explanation exists. Member states argued that the unfortunate and exceptional character of the Arab Spring induced an extraordinarily high number of migrants

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[1] No universally accepted definition of 'the Arab world' exists. However throughout this paper it will include the 22 countries belonging to the Arab League (Seib 2005:605).

[2] Throughout this paper the term migrant will be used as an umbrella for both labor migrants and refugees (Klepp 2010:3).

[3] Throughout the paper the term 'refugee' shall apply to 'any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. (1951 Refugee Convention) (UNHCR 1951)

for which EU member states were not prepared. However, in the 1990s Schengen States managed to cope with hundreds of thousands of refugees and immigrants (Parkes 2011a). Looking at more recent data a more manageable 54,000 people reached Italy, Malta and Greece in 2008. Over the next two years, border control measures were sharpened by the EU, reducing the numbers of migrants significantly. The number of migrants resulting from the Arab Spring was 58,000 (Frontex 2012). To conclude, this 7.5 percent increase compared to 2008 cannot be called an exception and so the existing explanation is false.

If the number of migrants is not able to explain the inability of the EU to protect migrants, why were member states falling short? Evidently there should have been enough mechanisms to effectively regulate flows of migrants. The *acquis communautaire* of the EU has always been subject to international law, including the obligation to help people fleeing persecution, wars and torture. That is why a considerable amount of effort has been put into an equal treatment for people who apply for asylum in the EU (Bomberg at al. 2008:138-158). Thus, in spite of the instruments created to protect refugees in Europe, member states have failed to protect refugees coming to the EU as a result of the Arab Spring.

Suggestions in literature on possible explanations for the inability of the EU to protect refugees, draw on the fact that prior to the Arab Spring an increase in border security was not accompanied by adequate mechanisms to protect refugees. Nonetheless, to date, no complete analysis has been provided in literature as to why the member states fell short in their obligations to protect refugees. This begs the question whether a near-sighted attitude adopted by the EU when improving border security, simultaneously and unwillingly led to mechanisms complicating and diminishing the protection of refugees. The research question guiding this study therefore is: to what extent has a near-sighted European border policy, led to an inability of the EU to protect refugees? I use the word 'near-sighted' to designate an attitude of the EU and the member states focused on border security, with - as a consequence - little attention for other aspects of border policy, such as the protection of refugees.

In order to comprehend the impact of the EU's mechanism to protect refugees completely, it is also important to research the most recent influx of migrants testing the border policy of the EU. The Arab Spring will serve as an illustration, highlighting the weaknesses of the EU mechanisms that were supposed to provide protection to refugees.

The significance of this study is paramount as it contributes not only to the understanding of difficulties concerning EU refugee protection, but also the weaknesses and handicaps of a multilateral organisation such as the EU. The societal implications of the paper are twofold. First of all, this study stresses the importance that the EU continues to give protection and prospects of a better future for refugees in need of help and concurrently to uphold the commitments to international refugee agreements such as the Geneva Convention (Malström 2011b). In the second place, not offering protection has wider implications on the construction and strength of the EU. It emphasises flaws of internal cooperation between EU member states. France for example, has reinstated its border control with Italy out of distrust that the border will not be adequately secured. This is contra-efficient to the main idea of Europeanization of the people (Parkes 2011a), the reconstruction of borders, stops the free movement of people. In many areas of European cooperation, the free travel area is suffering from a chronic lack of trust between its members (Nielsen 2012). The full effects of a collapse of Schengen Area are untold, but it would likely affect the free movement of goods as well.

The result of this analysis suggests that even prior to the Arab Spring, most of the EU's policies and regulations were considered by EU member states and NGOs as incapable of protecting refugees. This was due to weak legal foundations, insufficient instruments and mal-implemented instruments. The failing mechanism of the EU gave room to EU member states to refrain from their obligations and acts out of national interest.

This research is presented in five chapters. Chapter I presents the literature pertinent to my study. The Chapter will elaborate on explanations that have been provided to account for the failure of refugee protection by the EU. As such, it will show how the dialogue between different scholars has addressed several questions but left others unanswered. This blank in literature will be the start of my research. This is followed by Chapter II which stipulates some of the theoretical insights and dilemmas that have emerged as a result of refugee protection. Then I will come the main part of the research, which analyses and assesses refugee protection mechanisms in Europe. Chapter III presents the research and findings concerning three instruments of internal European border policy. Chapter IV presents the research and findings concerning instruments of external European border policy.

1. LITERATURE REVIEW

The issue of refugee protection has been the focus of intense debate in recent years, much of which is centred around questions regarding how far and in what ways migrants, including refugees, pose a problem or a threat to recipient states. From this debate, another question has been cropping up recently, namely, to what extent do refugees still receive the full protection of recipient states according to the Geneva Convention? The following review of the literature addresses these questions and represents the literature pertinent to my research study, namely, securitization[4] of migration, refugee protection in the EU, and refugee protection in the EU during the Arab Spring.

1.1 Securitization of migration and the effect on refugee protection

The mobilization of people around the globe has increased with growing populations, easier and cheaper forms of transport, and new technological advancements (Squire 2009:8). Although migrants were once welcomed in territories such as the US and Europe, more recently the issue has arguably become securitized (Faist 2004; Huysmans 2006; Guild 2009; Vaughan-Williams 2009).

While consensus appears to exist amongst experts concerning the process of securitization, there is disagreement regarding the reasons leading to and accelerating this process of securitization. Some scholars argue that the process started in the 1980s (Weiner 1995), while others argue that migration was securitized in the aftermath of the September 11 attacks in 2001. International migration has served as a fitting reference point for indistinct fears (Weiner 1995; Choucri 2002; McNevin 2007) which are related to the threat of international crime, terrorism and the dissolution of transitional forms of community (Vaughan-Williams 2010). Squire (2009) analyses the UK and argues that asylum seekers serve as a scapegoat for broad shifts in governance and belonging, often articulated as job insecurity and economic uncertainty. This negative mindset of the UK population towards migrants pushed the government to limit the number of asylum seekers and complicate the asylum application process.

[4] The process of turning a policy issue such as migration into a security issue (Faist 2004:332)

Guild (2009) emphasized the consequences of this negative mindset. According to her, the consequences stemming from the securitization of migration complicated the ways in which states live up to their obligation to protect refugees in accordance with the Geneva Convention. Guild explains that the failure of the state to protect refugees is a consequence of the securitization of migration. In contrast to other scholars she focuses on the individual rather than the state's collective security. Exclusion of migrants is the consequence of the state's maintenance of collective security, which enters into conflict with the individuals claim of individual security (Guild 2009, Cohen 2003). Linking this back to border policy and refugee protection in the EU: when the EU tries to secure the collective by improving EU border security, individuals not belonging to this collective – migrants including refugees – enter into conflict with state security.

1.2 Refugee protection and EU border security

The EU has initiated several mechanisms to regulate its borders and prevent illegal migrants from crossing. With the diffusion of borders and the categorizing of migrants, this initiated a failure to protect refugees. The following section firstly describes how scholars explain the relationship between an increase in border control and the search for new migration routes, which led to an externalization of border controls. Secondly, it will describe the consequences of fusing refugees and economic migrants. The last section will elaborate on the Arab Spring and on the causes for the failure to protect refugees.

The start of an integrated EU border policy dates back to 1985 with the creation of the Schengen Agreement.[5] Among others, it pledged to implement the principle of free movement of persons across the Schengen Area. The Schengen Agreement was also incorporated into the EU legal framework by the Treaty of Amsterdam in 1997. The agreement abolished all internal borders and created a single external border. This external border was in need of increased border controls and common policies (EC 2012). Moreover, the securitization of migration led to a process of 'illegitimizing' the presence of immigrants (Pinyol-Jiménez 2011).

By securing the *de jure* border and preventing migrants from entering Europe over land, new regulations simultaneously increased smuggling and trafficking networks. Migrants looked

[5] The Schengen Agreement was signed by France, Germany, Belgium, the Netherlands and Luxembourg.

for new less controlled routes to enter Europe, which are usually longer and more dangerous. This stimulated a shift in the EU's conceptualization of the border, by controlling the border at sea and in third countries (William Walters 2002; Guild 2009; Vaughan-Williams 2010). In other words, the EU borders were not solely at the *de jure* border anymore, but border control occurred also at sea and in third countries. This is important when studying the EU border policy an internal and an external dimension of the border now exists.

Despite the fact that this change in border security was initially designed to maximise flows of legitimate human traffic while filtering out illegitimate movement, scholars point out that entering the EU was made more difficult for both parties, especially those of which the categorization – economic migrants or refugee was still uncertain. This label for migrants is very important as people migrate out of economic or protection seeking reasons. Fusing economic migrants and refugees under one umbrella term and requesting them to follow the same procedures can therefore be troublesome (Squire 2009).

1.3 Refugee protection during the Arab Spring

Literature on the EU border policy and refugee protection during the Arab Spring is still limited. Nascimbene and Di Pascale (2011) have shed light on the policies of Italy specifically during the Arab Spring. They blame infringement of refugee protection on the fact that the situation was out of the ordinary and that Italy, when asking for help to the EU did not receive it. The solidarity principle was one of the principles to guide migration. It demands EU member states to act jointly and to assist one another in face of disasters, emergencies and crises within the EU. They question the adequacy of this instrument and the genuine spirit of solidarity between the member states (Nascimbene and Di Pascale 2011). Parker partly agrees with the questionable effectiveness of the solidarity principle but states it is not certainly a situation out of the ordinary (Parkes 2012). He confirms that the Arab Spring indeed highlighted the weaknesses of the migration policy. According to Nascimbene and Di Pascale (2011), the Arab Spring led to reflection and opened the debate on the migration policy instruments available in the EU in a situation of strong pressure on the mechanisms regulating migration, affecting one or more member states. The EU-mechanisms were tested by the Arab Spring.

There were more EU mechanisms causing an inability to protect refugees during the Arab Spring. This paper will outline the strengths and weaknesses of these mechanisms by comparing the initial aim of the mechanisms and its feasibility in reality. This has not been

researched before and is now possible as a result of the high but not exceptionally high number of migrants as a result of the Arab Spring. The following chapter will sketch out the main concepts of refugee protection, followed by the hypotheses of my thesis, case selection and data selection.

2. METHODOLOGY

This research will carry on from the literature provided in the previous chapter. As the primary goal is to show the weaknesses and strengths of the mechanisms created to ensure refugee protection, this chapter will firstly elaborate on refugee protection and how the 'protection' will be measured. Then, I will explain the concepts of internal and external European border policy and the corresponding instruments that should ensure refugee protection. Subsequently, I will describe how the strengths and weaknesses of each concept will be measured by either the capability-expectations gap or by a case study. This is followed by stipulating the hypotheses guiding the research. Finally, I will outline my case selection, its relevance and the process of data collection.

2.1 Theory and hypotheses

2.1.1 REFUGEE PROTECTION

Refugee protection is the dependent variable (DV) in this analysis. I am aiming to determine whether refugees and migrants arriving in the EU received the protection granted under the 1951 Geneva Convention. Therefore, clear definitions are needed in order to categorize individuals. Depending on how an individual is categorized, he or she may acquire different normatively charged statuses. The allocation of statuses is the first step in the relationship of the foreigner with European security organs. Migration broadly refers to the movement of humans across borders whether forced or unforced, whether political or economic. Therefore the word 'migrant' in this paper refers to the individual enacting this movement. An asylum seeker applies only to those migrants who have physically reached the state's territory or its port, and who have submitted the claim for refugee protection. The label refugee will refer to 'any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it' (1951 Refugee Convention. Under Article 1(A)2). If he or she does not meet these criteria, he or she may instead be granted with subsidiary protection, often of a temporary nature (Haddad 2008:2-3). 'Irregular migration' designates the act of entering a

country in breach of migration laws and refers mainly to the act of crossing a border without appropriate authorization (Düvell, et al. 2008:3).

The benchmark for refugee protection for this research will consist of two principles: the international non-refoulement principle and the European standard. The non-refoulement principle, alternatively called the 'corner stone' of refugee protection, holds that 'no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or opinion' (Goodwin-Gill 1978:117). In the view of the UNHCR, the principle of non-refoulement should be applied both within and at the border of the territory of a state, 'irrespective of whether or not [the individuals] have been formally recognized as refugees' (UNHCR 1977). This is important because the 'border', as will be explained later in this Chapter, is not a static concept, rather it is constantly evolving and changing.

Upon arrival the benchmark for protection is what in this paper will be referred to as the European standard. A fair and efficient asylum procedure identifies individuals in need of protection and it separates out those who do not need protection and who can, in principle, be safely returned home (UNHCR 1977). For Europe, this entails a Common European Asylum System (CEAS), including permanent protection, subsidiary protection and temporary protection (Levy 2005:28). In addition member states should have enough capacity in terms of reception facilities, asylum seekers should have an equal chance of obtaining protection in all EU countries. 'Common standards of treatment, including legal security, socioeconomic benefits and freedom of movement, need to be adopted in order to prevent secondary movement of asylum-seekers and refugees' (UNHCR 2003). It should deal effectively with those eliminated from asylum after a fair and satisfactory procedure in line with EU law, in order to achieve or preserve the integrity of member states' asylum systems.

An instrument provided by the EU guaranteeing refugee protection will have the aim to live up to both principles. Hence refugee protection will be fulfilled when it lives up to the following two conditions:

1. No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened

2. Member states should be able to provide the needs and protection to nationals of third countries in need of permanent protection, subsidiary protection and temporary protection (Art 78 TFEU)

2.1.2. Instruments protecting refugees

This brings me to the independent variables (IVs): the instruments of the EU aiming to protect refugees. First I will elaborate on the internal and external border policy instruments aimed to ensure refugee protection. Then I will explain how the capability-expectations gap will be used to analyse the instruments. Finally I will explain the motivation to use the case of the Arab Spring to highlight refugee protection

Internal European border policy

The internal EU border policy will refer to the policy within Europe and at its *de jure* border and is mainly focused on agreements among EU countries to act in accordance with the burden sharing principle and common reception standards. Both should regulate migration within the EU and simultaneously ensure the protection of refugees as stipulated above. The link between the creation of internal EU border policy and refugee protection is mainly underlined by the importance to commonly reach consensus, implement and execute the regulations ensuring equal treatment, provide migrants with necessities upon and after their arrival in the EU and offer the ability to request asylum. These three objectives of internal EU border policy are provided by the burden sharing principle and the reception directive. Whether these two instruments are in practice capable to protect refugees is analysed using the capability-expectations gap.

Burden sharing principle

Burden sharing refers to two principles: the solidarity principle and the fair sharing of responsibilities. It simply entails the fair distribution of the burdens consequent to EU borders, immigration and asylum policy (Thielemann 2006:4). Both underpin the responsibility to any collective response to any kind of threat and should be capable of coordinating the migration influx into the EU. Therefore it is part of the EU's internal border policy. The applicability of this principle to my research will be explained by the capability-expectations gap. In this study it is used as a proxy. On of the tasks of the burden sharing principle is to share the burden of refugees between countries, and if prior to the Arab Spring it was known that this principle would not work in practice, than one can state a failure to protect refugees is a result

of an unwilling attitude of the EU. The gap between expectations and capability will give an insight as to the ability of EU member states to act jointly and also in the dominance of individual state interests at the cost of common European interests. The responsibility to protect refugees will be left to fewer countries, which will reduce the capacity to protect refugees.

Reception of refugees

Whether or not the burden sharing principle is effective, migrants should always be registered and be given temporary protection. The reception standards of the EU are laid down in a directive and are an integral part of the protection of refugees in Europe. A well-organized registration system ensures the processing of the asylum request and determines whether migrants are classified as refugees or as other kind of migrants. In addition, the refugees should be offered common standards including legal security, socioeconomic benefits and freedom of movement (UNHCR 2003). This is all stipulated in the Reception Directive of 2003 (EC 2003). If these regulations are not well implemented or are not elaborate enough, then a failure of states to protect refugees can be observed in two ways: directly and indirectly. Directly, when migrants are not treated in line with the procedures laid down, such as imprisoning migrants in detention centers, or non-provision of medical care when needed. Indirectly, when refugees might not receive the full application procedure ensuring that they be granted protection and a (temporary) residence permit or when refugees or asylum seekers decide to leave the country on their own initiative and try to seek asylum elsewhere (secondary movement)[6]. The applicability of this principle will be tested by the capability-expectations gap.

These two policies of the EU become even more interesting as they are all interlinked. When burden sharing is not as effective as expected, more pressure will be on the reception of refugees. I propose that a near-sighted border policy prior to the Arab Spring caused an inability of EU member states to protect refugees during the Arab Spring. This focus on securing the border evolved out of the increasing number or regulations and agreements trying to fortify the border and restrict criminal activities, terrorist and illegal immigration, as described in the literature above.

[6] 'the phenomenon of refugees, whether they have been formally identified as such or not (asylum-seekers), who move on in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere' (ExCom 1989: No85 in Bouckaert 2007)

For each independent variable – burden sharing and reception – I will look into the actual regulations to fulfill these principles and their aims. What have member states agreed upon? Then, I will outline whether EU member states were able to live up to the agreements and implement the instruments provided. Finally, I will show whether this gap between capability and expectations caused an inability to protect refugees of the EU during the Arab Spring. The hypothesis that will guide the research of EU internal border policy will therefore be:

> *Hypothesis I: The bigger the gap between expectations and capabilities of internal EU border policy, the less effective EU refugee protection.*

External EU border policy

As delineated in the previous chapter, the EU's border policy is not solely aimed at the actual border. Therefore, a separate framework will be needed to test the expectations and capability of EU policies maintained outside the actual border. The phenomenon of the externalization of the EU border has been examined by Didier Bigo and Elspeth Guild (2005), who theorize that border controls do not solely occur at the *de jure* EU border as marked on a map, but also at the Mediterranean Sea and that controls are even conducted in countries which form part of the European Neighborhood Policy (ENP) (Bigo & Guild 2005:145). Christina Boswell (2003) also addresses this shift of border controls, stating that the EU attempts to manage migration through cooperation with sending or migration countries. She explains how illegal immigration is largely subordinate to the EU strategy of reducing migratory pressures by increasing development aid (Boswell 2003: 636). Klepp (2010) builds on this view and states that the European policy of firstly intensifying cooperation with transit countries and countries of origin of migrants, and secondly strengthening the joint border control missions with the border agency Frontex[7] has not reduced migrant flows attempting to cross the Mediterranean. Therefore, the new border regime is counterproductive. Furthermore, because Frontex had missions to intercept boats at sea, it remains unclear who is responsible for the asylum claim of the potential refugees. This lack of clarity and insufficiency in law has allowed forces in the Frontex mission to operate with little regulation and oversight and certainly not in line with refugee protection.

[7] Frontex is an agency of the EU, set up in 2004, with the responsibility is to coordinate operational cooperation between member states, in the forms of joint operation. The ultimate goal is to prevent the arrivals of irregular migration (Nambiscnene 2011:351).

Third country agreements

The EU's external border policy is focused on the agreements between EU countries and third countries. The former are mainly centred around stability and aimed at developing countries in the North African region as a buffer region for South European borders. Relating this back to the ability of the EU to protect refugees, if third country agreements lead to a prevention of refugees to request asylum in EU member states, or when third country agreements are made with countries that do not recognize the Geneva Convention, then this leads to an infringement of the non-refoulement procedure. This paper will use a case study of third country agreements between Italy and Libya to illustrate the possible effects of such agreements. The choice for these countries is derived from the fact that in the past five years this route was the main route for refugees to Europe (Frontex 2012). Moreover, I will show that my conclusions do not solely apply to this third country relationship, but to third country relationships in general. The guiding hypothesis will therefore be:

Hypothesis II: the more cooperation between third countries and the EU on controlling migration, the less effective EU refugee protection.

EU border policy at Sea

EU border policy also takes place at sea (Bigo and Guild 2005; Klepp 2010). Rather than looking into all the instruments for maritime border policy, this research will focus on the implementation by member states of EU mechanisms to protect refugees at sea and the EU's main maritime border policy instrument, Frontex. Member states play an important role in the implementation and execution of law while Frontex promotes, coordinates and develops European border management. In terms of migration it should detect migration routes and boats in despair while EU boat patrols are obliged to help the passengers. As it is an EU broad principle it will again be analysed by the capability-expectations gap. Relating this back to refugee protection during the Arab Spring, this research will stipulate the initial aims and the tools given to member states and Frontex[8] in order to live up to the expectations. If these were clear and effective, then it depends on the implementation of the provisions whether refugees enjoyed protection at the Mediterranean Sea. However, if this has not been the case, the EU

[8] European Agency for the Management of Operational Cooperation at the External Borders of the member states of the European Union (Frontex 2012).

has failed to protect refugees. Again this will be highlighted and illustrated by the case of the Arab Spring.

Hypothesis III: the more border controls at sea, the less effective EU refugee protection.

2.2 Method of analysis

The method of analysis used throughout my paper will be based on the capability-expectations gap. The following section will first describe the theoretical background and then will be shown how it fits into this analysis.

Capability-expectations gap

The capability-expectations gap is a central theory demonstrating weak aspects of European foreign policy. The initial idea behind this theory was articulated by Hill (1993). He identified the role of the European Community (EC) between what had been discussed and what it was actually able to deliver. This gap could be divided into three parts; the ability to agree, the availability of instruments and the allocation of resources. The capability-expectations gap was not meant to be a static concept, but rather a measure by which EU foreign policy could be examined (Hill 1993; Hill 1998; Hill 2004). Criticism was raised arguing that the EU does not solely act to fulfill its expectations but also to change the norms in the international system. Therefore, the expectation-capability gap is not all inclusive (Manners 1993; Norgues 2007). However, this criticism does not apply to this study as the EU does not aim to change the prevailing norms of the international system with its EU border policy.

As noted, Hill used the capability-expectations gap to understand European foreign policy. While acknowledging that this testing method has never been applied to European border policy before, this paper will show it is in fact very well suited to do so. The application of this theory as a measure for EU border policy can be justified by the threefold division; the ability to agree, the availability of instruments and the allocation of resources. Figure 1 explains the analysis used in three steps. Firstly, the capabilities-expectations gap explains the expectations in terms of objectives and legal provision. Secondly, the instrument should be entirely implemented in order to be effective. Thirdly, sufficient tools should be provided to live up to the expectations. As explained in Figure 1, the moment of testing will be the Arab Spring.

Figure 1: Analysis through capability-expectations gap

The capabilities of the instruments to live up to the expectations are shown when a considerable amount of pressure lies on the application of the instrument. Every instrument of EU border policy will only be capable to protect refugees if the instrument is strong, completely implemented, and has been given enough tools to protect refugees.

Data collection

For the purpose of my study, I will utilize existing data. For all four IVs I will use EU legislation, policy papers and evaluation papers to see whether EU member states were able to agree upon the EU border security instruments and the objectives of the instrument. I will use evaluation reports of both European institutions – EU, European Commission (EC), European Parliament (EP) and the Council of Europe (CoE) - as by NGO's - Human Rights Watch (HRW), Amnesty International and think tanks – Stockholm International Peace Research Institute (SIPRI), Clingendeal. The combinations of these different perspectives will provide an insight in the implementation before the Arab Spring.

2.3 Case Selection

The motivation to use the case of the Arab Spring as a testing device for EU border policy instruments is twofold. Firstly, it is a recent event which best reflects the effectiveness of the current EU Border security policies. Secondly, the influx of migrants was not exceptional but was still significant enough to illustrate clearly what aspects of EU border policy were incapable of protecting refugees. In other words, the Arab Spring highlights weaknesses in EU policy which caused an infringement in refugee protection.

Case data

In order to find out whether the EU border policy was prepared for this event I will look into newspaper articles from December 2010 until present, retrieved from the newspaper database Factiva[9]. Furthermore, I will look into assessments of dependent as well as independent parties. Dependent assessments will include review meetings by the Council of Europe and the EC, Europol, Frontex and member states. Independent assessments will include research carried out by Eurostat, the Institute national d'etudes démographiues (Ined) and NGOs such as HRW and Migrants at Sea.

[9] A joint venture between Dow Jones and Reuters which provides extensive access to global news sources

3. INTERNAL BORDER POLICY

The purpose of this chapter is to examine the internal EU border policy instruments designed to protect refugees. This chapter is divided into two parts covering the burden sharing principle and the reception standard. The research will be conducted by analyzing the instruments through the capabilities-expectations gap as outlined in the previous chapter. This entails that I start outlining the aim and the instruments provided by the EU to make this instrument workable. Then I will outline how these instruments have been implemented and what problems they encountered before the Arab Spring.

Subsequently, I will show how the instruments functioned during the Arab spring and whether they were able to provide refugee protection. For each instrument a conclusion will be drawn whether the instrument was able to fulfil its aim to protect refugees or not and what the reasons for failure or success were.

3.1 Burden Sharing

'World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it' (Schuman 1950)

The creative efforts are in EU law illustrated by a series of generally acknowledged normative principles (Manners 2008). Two examples illustrating these creative efforts are the principles of solidarity and fair sharing of responsibility. Throughout this research I will refer to them collectively as burden sharing. In literature and law more attention is given to the principle of solidarity than fair sharing of responsibility. Therefore throughout this section I will mainly refer to the principle of solidarity, unless stated differently. Both entail the fair distribution of the burdens consequent to EU borders, immigration and asylum policy. Both underpin the responsibility of collective response to any kind of threat and should be capable of coordinating the migration influx into the EU. As referred to in the previous chapter I will use burden sharing as a proxy to measure the capability of EU member states to protect refugees. If the burden sharing principle is not capable of achieving what it was meant to achieve, then this will result in Southern European countries having to deal with more asylum application processes than Northern countries. This will overheat the asylum system of the former countries. If this situation occurs, people in need of protection will not receive the

treatment and care that they should receive under an effective refugee protection system. Relating this back to my hypothesis this entails that:

> *Hypothesis I: The bigger the gap between expectations and capabilities of internal EU border policy, the less effective EU refugee protection.*

The following section will first outline the aim of the solidarity principle and the principle of fair sharing of responsibility and stipulate how both principles should protect migrants. Then, I will show how the principles have been implemented and what further policies have been drafted. I will show what the implications of these policy instruments were during the Arab Spring and finally conclude whether the principles of burden sharing are able to protect refugees.

3.1.1. OBJECTIVES AND LEGAL BASE

This subsection will provide an overview of the foundational aims and legal bases of the principle of solidarity and the principle of fair sharing of responsibility. The relevance is twofold. On the one hand principles only work if implemented by a strong legal base. If a legal base is weak, all regulation founded on this base will be similarly weak. On the other hand, foundational aims are important as they give a framework to check if the instruments comply with the aims. Both will provide and answer on the question why expectations were (not) fulfilled.

The solidarity principle is a broad principle demanding EU member states to act jointly and to assist one another in face of disasters, emergencies and crises facing the EU (Art. 222 TFEU). It underpins any collective response to any kind of threat, but also deals with the EU's area of Freedom, Justice and Security. Article 67(2) TFEU refers to this principle of solidarity and should be read as the coordination of migration influx between EU countries. Furthermore, the article states that 'criteria and mechanisms for determining which Member State is responsible for every migrant had to be developed' (Art.67(2)). However, the EU did not stipulate these criteria and mechanism as prescribed in the Article.

The principle of fair sharing of responsibility is a common framework on how genuine and practical solidarity should be built. Article 80 TFEU states that '(w)henever necessary, the Union acts adopted pursuant to this article contain appropriate measures to give effect to this

principle' (Art.80 TFEU). In other words countries should take responsibility of the burden other member states face and that this should be shown by solidarity. The precise meaning of both provisions and the implications for EU institutions and member states is unclear. Especially as the principle of solidarity means different things to different people and member states (Myrdal and Rhinard 2010:1). For one, solidarity may entail the amount of support that flows to a member state in need. For another it could mean that every member state should act constantly in line with the agreements, and thus do their 'homework', in order to avoid a problematic situation (Myrdal and Rhinard 2010:1). In other words, if the principles of burden sharing remain rhetorical devices, it will be a difficult tool to use in practice (Myrdal and Rhinard 2010:4). The EU has not taken the appropriate measures as stipulated in art 80 TFEU. The principles remain unimplemented, and thus weak and unclear.

The principles of solidarity and fair sharing of responsibility were established in order to share the burden of the number of asylum procedures. Because the principles are not implemented they cannot be enforced. This situation gives too much room for own interpretation by member states. Only by fortifying the principles of solidarity and fair sharing of responsibility and providing better guidelines, will the principles be helpful effective in sharing the burden of migrants among member states.

There have been attempts to clarify these principles in the Tampere programme (1999), the Hague Programme (2005) and the Stockholm Programme (2009) (Myrdal and Rhinard 2010:4). I will focus on the Stockholm Programme as it was the latest stage before the Arab spring on clarification and mechanisms that should guide the burden sharing principles.

3.1.2. Implementation

Before the burden sharing principles were applied to migration policy, Northern EU states had very solid borders and a well regulated migration system. Together with the creation of the Schengen zone a new common migration policy had to be created. The Schengen system was a reflection of the border policy of the Northern European states. Southern European states did not want to dent their pride and so did not request for help during the implementation process. However, Southern states had to deal with most of the incoming migrants and they were not able to live up to the Schengen policy. Aided in part, by their resistance towards plans for more supervision of border policy (Parkes 2011b).

In December 2009, the Stockholm Programme was adopted to try and give more shape to burden sharing principles. The fair sharing of responsibilities and solidarity principles between the member states should, according to the Stockholm Programme, be 'promoted' especially with member states facing particular pressures. This should be achieved through a broad and balanced approach and mechanisms should be further analysed and developed (EC 2010a). The most concrete measure stated is that member states should use, in a more effective way, existing EU financial systems aiming at reinforcing internal solidarity (EC 2010a:71). Clearly, this 'deepening' of the solidarity principle remains unclear and does not give member states a guideline on how this principle should be read or implemented. Mainly northern countries have been giving little support for stricter regulation of the solidarity principle (Myrdal and Rhinard 2010:8). The problems that it caused in times of migration pressure are highlighted during the Arab Spring.

3.1.3. THE ARAB SPRING

During the Arab Spring it became clear that expectations of burden sharing not only came from Southern states. The expectation was that the Northern states as a result of the principle of solidarity would assist the Southern states. The Arab Spring highlights the weakness of the principles of solidarity and shared responsibility as stipulated by SIPRI. As a result of the large flow of refugees, caused by the uprisings, Southern European states faced large amounts of immigrants. Too many of them requested asylum, impossible for the recipient Southern states to handle (Caminelleri 2011). According to the burden sharing principles member states should assist those member states under strain. Were the Northern European member states willing to help the Southern States by taking asylum seekers for their account?

In order to provide an answer to this question, data on asylum seekers applying for asylum in the member states is essential. In the first half of 2011, more than 75 percent of all asylum applications were made in 6 out of 27 member states. The UN identified 8000 people in need of help and the EU member states only promised to provide 400 of them shelter. In the meantime over 50,000 migrants crossed the Mediterranean Sea, arriving on the Italian island Lampedusa[10] and on Malta. In May the European Commission's first pledging – promises to house refugees - conference on Malta's intra-EU resettlement pilot project for asylum seekers

[10] Lampedusa is an Italian Island an a prominent migration destination for those seeking to enter the EU (Heller et al. 2011:10)

was held (Caminelleri 2011). This was the possibility for EU member states to show their fair sharing of responsibility and solidarity. However, Malmström concluded after the conference that the EU could not impose solidarity on member states because their decisions in the area are sovereign (Malström 2011c). However, Malmström's judgement was incomplete. The reason that member states acted in correspondence to their national interest was because of non-implementation of the principles. The result was that only 300 of the 50,000 refugees were relocated from Malta to one of the other member states (Caminelleri 2011).

Another effort to motivate EU states to live up to both principles was in December 2011. The UNHCR organised a ministerial meeting in Geneva in order to motivate states to come to Geneva with pledges related to protection, assistance and durable solutions for refugees, including resettlement and local integration (UNHCR 2011). No pledges concerning resettlement came from the EU as member states were unable to agree on a joint pledge (Malmström 2012). This failure to effectively share the burden of migrants shows that the solidarity principle and the fair sharing of responsibility do not reflect the expectations. Yet, the weakness of these principles lies mainly in the non-implementation of the principles. The weakness became even more visible during the Arab Spring as the circumstances in Europe were not very supportive either.

Solidarity Consequences for Schengen

According to Cecilia Malmström the inability to implement the solidarity principle was not only caused by the large stream of migrants arriving on European territory. Also a lack of trust and the political mood negatively influenced the applicability of the solidarity principle. The lack of trust was mainly a result of the economic crisis in Europe. This crisis of confidence among Europe's leaders influenced their capacity to find common solutions (Malmström 2012). The political mood in member states was not very favourably either. Since World War II there have not been so many populist and xenophobic parties in the political arena as in the last ten years (Malmström 2012). Arguably they exploit the current crisis trying to blame immigrants rather than poorly managed national economies. Moreover, as stated before, the number of migrants has not been this small in many years. The consequences of the inability of countries to enforce the solidarity principle became a bone of contention within the EU. Italy decided on 5 April 2011 to issue temporary residence permits to refugees granting them free circulation in the Schengen area (Pawlak 2011:38). As a result, a number of member states, led by France and Germany, accused Italy of infringing the

‘Schengen spirit’ and threatened to return border controls. Italian interior minister Maroni in turn accused his counterparts of failing to show solidarity: ‘Italy has been left alone’, he said, ‘I wonder whether in this situation it makes sense to remain in the European Union’ (Marroni 2011a). These actions and statements explain that not only the principles of burden sharing have failed these principles were harder to put into practice due to the unfavourable financial and political circumstances. This had a significant effect on the strength of the Schengen zone and the corresponding freedoms.

3.1.4. Findings

This analysis shows that the burden sharing principles are not implemented as effective tools to bring countries to pledge for asylum seekers. Moreover, the analysis shows that the expectations of the burden sharing principle were different among Northern states compared to Southern states. These expectations could be different because the implementation of the principles lacked. Northern member states, aggravated by the unfavourable economic and political conditions were not willing to implement the solidarity principle. Southern states on the other hand were incapable to rely on their Northern counterparts when the situation became critical. This gap between willingness and expectations affected the trust between EU member states. When principles are not implemented, member states are apt to go for their national interest, certainly in unfavourable times. Therefore Malmström had to conclude that the EU under the given circumstances could not impose solidarity on the member states.

3.2 Reception standards

Reception standards are an integral part of the protection of refugees in Europe. A well-organized registration system ensures the processing of the asylum request, and determines whether migrants are refugees or whether they are hoping for better financial future. Refugees are not received with open arms in EU member states. It is a lengthy and costly procedure, and the distinction between economical migrants and refugees is not always clear. The reception standards aim to guarantee refugee protection under European Law in line with the Geneva Convention. This section will investigate whether the standards agreed upon by member states and laid down in regulations and directive, were working in practice. Throughout this section the reception standards will be used both as proxy and as measuring instrument to check if refugee protection is effected as anticipated. As in the previous chapter

the capabilities-expectations gap will be the analysis devise to show the weaknesses and strengths of the instruments. The guiding hypothesis in this section will be:

> *Hypothesis I: The bigger the gap between expectations and capabilities of internal EU border policy, the less effective EU refugee protection.*

This section is structured as follows. I will first outline the objectives of the regulations in the Treaty of Lisbon and the Reception Directive. Then I will look into the implementation and whether it ensured refugee protection during the Arab Spring. Rather then looking at all the member states, this section will focus on Greece and Italy as they were the two main recipient states (Frontex 2012b). Finally, this section will state whether there was a gap between what was expected to be possible in terms of reception standards and what European member states were able to deliver and in case of a gap whether this had affected the capabilities of the EU to protect refugees.

3.2.1. Objectives and legal base

This subsection will provide an overview of the foundational objectives and legal bases on which the reception of migrants in EU member states was built. The relevance is twofold. The foundational objectives are important as they give an insight into the purpose having a reception regulation. A strong legal base is important to implement the purpose of the objectives. If a legal base if weak, all regulation founded on this base will be similarly weak. Objectives, legal base and regulations together will give a measure instrument to check if expectations were fulfilled.

As noted since the Treaty of Amsterdam the EU has been working on a Common European Asylum System (CEAS). The main aim was to establish common procedural standards (Levy 2005:28). These are stipulated in Article 78(2f) TFEU, as it calls for the establishment of standards for the reception of applicants for asylum or subsidiary protection. The majority of asylum seekers do not have the means to support themselves. This regulation stipulates that, while waiting for a decision on their claim, they must be provided with basic necessities, such as accommodation, housing and clothing.

The main standards[11] for the reception of migrants, and thus also refugees, are laid down in a Directive established in 2003, referred to as the Reception Directive. The reception standards address standards for the arrival of the applicant, the provision of documents certifying his or her status as a asylum seeker including information on their rights, family unity, access to the labour market, healthcare, housing, food and clothing, and contact with legal advisers. If the asylum is refused, the applicant should have the possibility to appeal. Member states should also establish a mechanism to guide, monitor and control these policies (EUR-lex 2003).

The main aim was to provide a secure environment for refugees throughout the EU. Whether these legal provisions are strong enough depends on the amendments and implementation by member states.

3.2.2. IMPLEMENTATION

The implementation of the Directive was obligatory and has a direct effect[12] (Chalmers et al. 2010: 286). An evaluation of the implementation of Directive 2003/9/EC by member states took place in 2007. This report states that the Commission addressed 19 member states informing them of the infringement or maladministration in the implementation of this Directive[13]. According to the report, serious concerns existed regarding the applicability of the Directive in all premises hosting asylum seekers. The UK, Belgium, Italy, the Netherlands, Poland, Luxemburg and Cyprus[14] had infringed the Directive regarding the application of detention centres (EC 2007). Migrants were detained even though this was in breach with EU law. Several member states insufficiently informed the asylum seeker of their obligations and benefits under EU law. One of the reasons for this insufficient information provision was the lack of documents printed in the languages of the immigrants. This occurred in spite of the possibility for member states to request financial assistance from the European Refugee Fund in order to increase the number of languages in which the information was available. Moreover, not all member states have complied with the ruling of the Directive to provide asylum seekers with valid documentation. One issue considered all member states, as it describes that they all do not issue documents to the migrants placed in

[11] Council Directive 2003/9/EC
[12] When a legal provision has a direct effect, citizens can directly rely on this provision before their national court, when the deadline for implementation has passed (Chalmers et al. 2010: 286)
[13] The infringement of six member states was strong enough to bring the cases to the Court of Justice. Three of these were withdrawn and Austria was settled and the cases against Germany and Greece were still pending (EC 2007:2)
[14] The situation of Spain, Greece and Portugal was still unclear.

detention centres. For the procedure to withdraw reception standards only minor deficiencies were detected (EC 2007).

The report concluded that besides non-implementation of parts of the directive in certain member states it is especially the

> 'wide discretion allowed by the Directive in a number of areas, notably in regard to access to employment, health care, level and form of material reception standards, free movement rights and needs of vulnerable persons undermines the objective of creating a level playing field in the area of reception standards' (EC 2007:7).

In other words: the Directive allows the member states a wide discretion, and this wide discretion undermines the objective of the Directive to create a level playing field in the area of common reception standards. The Directive is a weak instrument, too weak to enforce the member states to implement the objectives of the Directive in common national procedures. So the objective of the Directive to protect refugees is not met. This report was written in 2007 and despite several repetitions of this report and requests by NGO's for amendments, up to the Arab Spring no changes were made.

3.2.3. THE ARAB SPRING

The uprisings in the Arab world instigated a temporary crisis in migration patterns from North Africa. An increase in migrants arriving on European territory pushed the reception facilities to its limits. In spite of the common minimum rules for reception, and the recommendation on reception standards in several reports, member states were still not capable of acting in line with these minimum standards. Even though the deadline for the CEAS was set on 2012, negotiations are moving slow (Malmström 2012). The upcoming paragraphs will explain the inability of the reception facilities to protect refugees during the Arab Spring in two of the main recipient countries: Italy and Greece.

Italy

From January until July 2011 over 55,000 migrants from North Africa arrived by boat on the Island Lampedusa, a small Italian island in the Mediterranean. Reception centres on Lampedusa were occasionally overwhelmed as it was initially equipped to hold 850 people. This forced the Italian government to request an emergency rule to relocate the refugees across all EU member states (Zaroug 2012). However as outlined in the previous chapter the response of European states was minimal. Another incident pushed Italy to its limits. A fire that was supposedly set by Tunisians destroyed most of a detention centre on the island. The government of Italy declared the detention centre as an unsafe port. HRW was one of the few NGO's that was allowed into the reception and detention centre areas. They expressed their enduring concerns about the situation of asylum claims and standards in Italy (HRW 2012:8). Both the housing provisions and the ability of the Italian government to provide a 'safe' place seemed insufficient. This added to the unwillingness of EU counterparts to help and led to the decision of creating readmission agreements, as will be explained in chapter 4.1

Greece

Greece was unprepared for the stream of migrants coming from Arab countries. Even after an increase in refugee recognition rate to 12.35 percent critical problems with the asylum system persisted. Especially, the access to asylum and review of claims were not in line with the standards set out in the Reception Directive. One of the main causes was that a new asylum system was adopted in January 2011 and was only expected to become fully operational in 2012. The standards of the detention centres were not living up to those set out in the Directive. According to HRW 'migrants and asylum seekers, including women and families with children, continued to be detained in inhumane standards' (HRW 2012:6). Moreover the problems Greece was facing were even harder to solve as of the fragile political and economic situation.

In June 2011 a proposal of the European Commission to revise the Reception Directive was presented and approved by the European Parliament in October. Unfortunately this revision has come too late for the migrants of the Arab Spring[15] (HRW 2012:2).

[15] The proposal includes broad grounds for detention, low standards on access to social assistance and healthcare, and expanded use of fast-track asylum procedures

3.2.4. FINDINGS

This analysis shows that the reception standards were not able to protect refugees during the Arab Spring. There is a gap between the reception standards and the actual practice. The member states do not live up to the reception standards, as they do not provide assistance towards the large numbers of refugees in need of protection.

The analysis also shows that the expectations of the reception of member states in terms of refugee protection were similar. Yet when implemented, the EC concluded in their evaluation report that besides non-implementation of parts of the Directive in certain member states it was particularly the 'wide discretion allowed by the Directive in a number of areas' that undermines the efficiency of the directive. In spite of several repetitions of this report and request by NGO's for amendments, up to the Arab Spring no changes were made.

A reason for this could be that there was no pressure in the two years prior to the Arab Spring especially because of the significant decrease in number of migrants in 2009 and 2010. This decrease in migrants, as later explained, was caused by the externalization of EU border policy. Thus this decrease in migrant pressure, possibly led to the disdain of countries to live up to the implementation.

During the Arab Spring both Italy and Greece proved to be unprepared for the influx of migrants. Reports of NGO's and newspaper articles indeed show that it was less realistic for especially bordering countries to protect the refugees according to EU law. In other words the expectations of a strong and solid European reception system were not reflected in the instruments to protect refugees and in the capabilities of the member states to grant protection. The weakness of the instrument was articulated in the non-implementation or mal-implementation and the wide discretion allowed by the Directive.

4. EXTERNAL BORDER POLICY

Having discussed the internal border policy instruments, I will now shed light on the objectives, implementation and actual performance of the external border policy. Partnership agreements with third countries and border policy instruments at sea should prevent the influx

of illegal migrants and simultaneously look after those in need of protection. The following two chapters will asses the instruments that should ensure refugee protection, and will apply them to the case of the Arab Spring.

Each chapter analyses the instruments of external border policy and whether they protect refugees sufficiently. If not, this chapter will analyse to what extent this is caused by the insufficiency and ineffectiveness of the instruments. These weaknesses of EU external border policy instruments probably give way to the dominance of intergovernmentalism.

4.1 Partnership with third countries

Migration issues have increasingly converged upon various areas of cooperation between the EU and third countries. This induced an enactment of the EU to 'adopt a cross pillar approach to migration, with an emphasis on financial aid for third countries to foster developments in order to reduce the irregular migration' (Pinyol-Jimenes 2011). In other words, EU border security did not just stop at the border but was externalised to third countries. In this section, I will investigate to what extent this externalisation of border control affected the capability of the EU to protect those in need. I argue that cooperation between the EU and third countries has not been supplemented by enough strong refugee protection instruments. In order to find out whether the third country agreements were near-sighted, the guiding hypothesis for this section will be:

Hypothesis III: The more cooperation between the EU and third countries on controlling migration, the less it was possible to protect refugees.

For purposes of clarification, this section will first briefly outline the background of third country partnerships, the ENP, the regulation in the TFEU and what these institutions aim to accomplish. Rather than focussing on all the third country partnerships, I will focus on the cooperation partnerships between Libya and Italy. This is followed by an outline of the effects of these partnerships during the Arab Spring and new partnerships that have been developed in 2011 to deal with the stream of migrants caused by the Arab Spring. Finally, I will outline my findings and show the effects of the externalisation of borders to third countries on the ability of EU member states to protect refugees.

4.1.1. Objectives and legal base

This subsection will provide the objectives of partnership agreements and the legal base on which they are founded. When the objective of partnership agreements is aimed at the prevention of incoming irregular migrants and this is similarly articulated in the legal base, then the legal base will not provide enough means to secure refugees. However if this legal base is sufficiently supplemented by refugee protection measures then the chances are higher that this will be the case in practice as well.

The European Neighbourhood Policy (ENP) was developed in 2004, with the intention of avoiding the emergence of dividing lines between an enlarged EU and its neighbours. It was aimed at strengthening the prosperity, stability and security of all its inhabitants. The ENP is mainly a bilateral policy between the EU and each of its neighbours. These countries include the North African states Egypt, Libya and Tunisia (Fraser 2012:61). Strengthening ties with the neighbours was based on a mutual benefit. In the case of controlling irregular migration, EU member states had made arrangements with the transit countries through which most of the migrants came. A regulation stipulating this partnership is article 78 of the TFEU. This legal base stipulates that these agreements have the purpose to manage inflows of people applying for asylum or subsidiary or temporary protection. However as this chapter will explain the objectives do not seem to reflect the purpose stipulated in this regulation.

Aims of partnership agreements

Partnership agreements have three main objectives. Firstly, an important objective is to prevent and reduce illegal immigration. This can entail cooperation within the third country, by creating housing facilities and detention centres, but also helping them to increase their own border control or increasing maritime control in their waters. Secondly it can entail strong action to prevent trafficking and smuggling of human beings (Meccanico 2012; Cuttitta 2010; Nascimbene and Di Pascale 2011). Thirdly, returning those migrants that do not fulfil the criteria of asylum seekers. Surrounding, this last aim, a lot of controversy exists. Agreements articulating this are referred to as readmission policies[16].

[16] These agreements aim at imposing a 'reciprocal obligation on the issuing third member states, upon application and without any further formality, their nationals if they do not or no longer fulfil the conditions for entry, presence or residence in the territory of the requesting state' (EC 2009).

To summarize, the purpose of the legal base is managing the inflow of people applying for asylum or subsidiary or temporary protection. This purpose seems to stand in contrast to the objectives. The objective is to prevent people from coming to EU territory. However nowhere is stipulated how refugees will be protected in the third country and how those refugees asking for protection can do so if they do not have the possibility to flee to the EU. The following case study on the partnership between the EU, Italy specifically and Libya will clarify this opaque link between objectives and legal purpose.

Partnerships between the EU and Libya

As noted, this research will shed light on the bilateral relationship between Libya and Italy. Libya was the main sending country during the Arab Spring and had strong historically rooted strings with Italy, the main recipient country (Frontex 2012b). Background information on the agreement is essential in order to clarify the motives to cooperate with Libya in the first place.

The EU, Italy and Libya: a partnership agreement based on a dual gain

The partnership between Italy and Libya started in 1998 with a police cooperation agreement. However, it was not until 2004 when EU diplomats expressed that cooperation with Libya on migration was essential and urgent. Moreover, the EU reiterated its concern about the level of illegal traffic across the Mediterranean from, or via, Libya (CEU 2011:7)[17]. Yet, there were more benefits that would be gained from a partnership agreement. The EU's interest in a cooperation agreement was twofold: emigrational centric and economical.

In terms of migration it was a dual gain. Both the EU and Libya were experiencing the negative effects of migration flows coming from Libya. The latter has always been an important country of destination for migrants from Africa and Asia. Additionally, since 2007 Libya has become a country of transit to Europe for legal as well as illegal immigration (ENP 2010). Libya became the most popular transit country as a result of several factors. Firstly, the efforts by Spain and Morocco to control irregular migration to Europe diverted the migration routes from Western Africa and Morocco to Central Africa. Secondly, the border controls in Tunisia had been strengthened, which also explains why Tunisian migrants chose to depart

[17] This refers to the decision by Libyan authorities in 2003 to disclose and dismantle their nuclear chemical and biological weapons programs and to take some responsibility for the bombings in the airplanes in 1988 and 1989 (CEU 2011:7)

from Libya even though it was further away from Europe. A third significant reason lies in the proximity of Libya to conflict zones in Sudan, Somalia and Eritrea.

As noted partnership agreements were also based on economic gains. In 2006 Libya was the third largest supplier of oil to Europe (ENP 2010:42), which does not only make Libya an important country for political cooperation but also makes it an economically attractive partner. On the side of Libya economic cooperation was also attractive as in 2007 EU member states accounted for seventy percent of Libya's trade (Gianiou 2010).

4.1.2. Implementation

To deal with the irregular migration coming from Libya, several migration agreements have been instigated. In 1998, the Italian government started talks on the joint management of irregular migration. This cooperation between Italy and Libya has focused on three aspects: police cooperation, maritime cooperation and readmission cooperation. On these three aspects agreements were established.

Police cooperation

The first agreement was signed in 2000. In this agreement Libya and Italy decided to cooperate to fight terrorism, organised crime, drugs traffic and illegal immigration, and an Italian investigation unit was established in Tripoli in May 2003 (EC 2005:15). Two months later, an executive agreement was signed, but its contents have never been made public (EC 2005:15).

Readmission

Readmission agreements do not only cover the nationals of the contracting countries but also non-nationals and stateless persons, who entered the EU through that country (Carerra and Hernández i Sagrera 2009:6; Coleman 2009). Until September 2004, all migrants sent by Italian authorities back to Libya were admitted to Libyan territory. Ultimately, Libya approved to readmit unauthorized migrants removed from Italy, even though no readmission agreement was signed (Cuttitta 2010:34). A formal readmission programme has not been signed until the creation of the Friendship, Partnership and Cooperation Agreement in 2009.

Maritime cooperation

Italy received a considerable amount of criticism on returning migrants from Lampedusa to Libya by European member states in 2004 and 2005. Italy, therefore, found a new way to strengthen their ties with Libya in order to restrict the number of migrants on their soil. Italy convinced Libya to let her control the maritime border regions. This was the first time that Italian boats were allowed in Libyan territorial waters (Klepp 2011:5). Simultaneously with 'the introduction of joint naval patrols by Italy in May 2009, the amount of illegal migrants arriving in Italy and Malta from Libya has fallen sharply' (EC 2010b:42).

The Treaty of Friendship, Partnership and Cooperation[18] between Italy and Libya had as aimed to strengthen peace, security and stability in the Mediterranean region, but was mainly centred around the readmission of migrants from Italy and its support to Libyan patrols in the Mediterranean fighting clandestine migration. This treaty has been ratified by Italy on 6 February 2009 and was certainly effective. Nevertheless, according to the European Parliament it was at the cost of migrants human rights. In 2009 nearly 1000 people were returned to Libya by Italy after being rescued or intercepted at sea. According to Italy's Minister of the Interior there was a plunge of 96 percent in the first quarter of 2010 compared to 2009 (EP 2010).

Framework agreement

Negotiation on a partnership agreement - framework agreement - between Libya and the EU started in 2009. This agreement aimed at 'the full reintegration of Libya in bilateral and multilateral international relations' and at a productive political dialogue on issues of common interest. One of the requests of the EU was a readmission agreement. Nevertheless, the Libyan authorities had no intention of accepting this. The framework agreement has never been signed and was still in the negotiation phase when the Arab Spring commenced (EP 2010). The reaction of the European Parliament on the readmission proposal in the framework agreement on this aspect was that 'given the systematic disregard for human rights in Libya and the persistence of torture and death penalty, it is unconscionable that the Council of

[18] This Treaty stipulates that both countries confirm not to use force against the territorial integrity or political independence of the other party or any means incompatible with the Charter of the United Nations (article 3). Moreover the treaty states that both countries shall not interfere with the internal affairs of the other and that Italy shall not allow the use of its territory in any hostile act against Libya (article 4).

Europe and the European Commission seek such an agreement to forcefully return people to Libya' (EP 2010). Still negotiations continued.

When migrants were not able to arrive in Europe, being sent back without receiving the formal procedure of reception and asylum request, what were the conditions for migrants in Libya? These conditions may give some insights in whether sending them back or preventing them from arriving on European soil was legitimate or not.

Migration standards in Libya

Migrants from Western and Eastern African countries did not only migrate for work opportunities but also because many were occasionally subject to collective expulsions and acts of mass violence (ENP 2010:7). Yet, the precise and detailed data on the number of migrants are not available as there is no institution in Libya that keeps record. Rough estimations of the Libyan authorities are that approximately between 600,000 to 700,000 legal foreign immigrants are living in Libya. Another 1.2 or 1.5 million migrants are residing in Libya on an illegal basis (ENP 2010:8). These numbers were substantial and they became more and more a quagmire for the Libyan authorities. Furthermore, a strategy paper created by the ENP indicates that Libya is not a source country for migration to Europe. In other words the migrants coming from Libya do not have the Libyan nationality themselves

Looking at the rights and circumstances of the repatriation destination Libya, one can hardly say it is appealing. Only amounting for migrant facilities, the EC reported in 2005 stated that the conditions of detention centres varied from relatively acceptable to extremely poor, and with some centres did not even housing unaccompanied minors and women in separate accommodation (EC2005:14). Outside these centres, migrants were not looked upon as favourable guests. In contrast, with an increasing number of migrants the local population became 'increasingly ambivalent about the migrants, some of whom are accused of carrying diseases, endangering security and negatively impacting the economy' (ENP 2010:40).

In 2007, the Association for Legal Studies on Immigration (ASGI) reported that hundreds of asylum seekers, including many Eritreans, and vulnerable groups like women and children, were imprisoned in detention centres in Libya (ASGI 2007). Already in 2007 it was well known that migrants in detention centres in Libya were being mistreated. In 2010 UNHCR

stated that Libyan authorities deported a group of 245 Eritreans, some of which had been beaten during their stay in Libya, back to Eritrea knowing full well that they could face torture in their home country (ASGI 2007).

Moreover, Libyan law makes no distinction between asylum seekers and economic migrants (Gianiou 2010). This means that refugees will not receive protection of any kind. When exploring Libya's legal framework, the EC acknowledged in 2004, and again in 2010, the fact that Libya is not a signatory of the Geneva Convention on the protection of refugees, nor did Libya have an asylum procedure or did it make a distinction between economic migrants and refugees. Also there were no regulations or procedures to ensure protection and respect of migrants rights In order to partly obey the EU request for more human rights recognition, Libyan authorities created new institutions dealing with anti-infiltration and illegal immigration issues. Still, all these bodies were in the development phase when the Arab Spring unfolded (ENP 2010b: 40).

Disturbingly, Libyan authorities repatriated migrants as well. An estimated 43,000 irregular migrants were repatriated in 2003, 54,000 in 2004 and 48,000 in 2005. According to a report of the European Commission on illegal migration in Libya '(m)any of the illegal immigrants in the centres seem to have been arrested on a random basis. The decision to return illegal immigrants to their country of origin seems to be taken for groups of nationalities rather than after having examined individual cases in detail' (Emphasis added) (EC 2005:14). In other words, no distinction was made between economic migrants and refugees.

Partnership agreements should make it possible to better regulate migration and thus also to provide a better treatment to migrants who eventually arrive on European soil. On the other hand police cooperation and maritime cooperation can possibly prevent people in need of protection to reach Europe. Partnership agreements were not able to protect refugees prior to the Arab Spring. The migrants that did arrive had the chance to be sent back to Libya, where no rules of protection or care applied to them and where they had the risk of being imprisoned or sent back to their home country irrespective of the danger for their lives. The reaction of the Italian government and the EU is important, as it allows us to determine what action they undertook to 'keep' providing assistance to refugees.

4.1.3. THE ARAB SPRING

Uprisings in Libya commenced in February 2011 and rebel forces were determined to continue until Muammar Gaddafi was overthrown as president of Libya. The death toll in Libya was with 30.000 significantly higher than in other countries facing uprisings in 2011 with another 50.000 people were wounded (Milne 2011). The uprisings succeeded in overthrowing the government on the 23th of August 2011. Clearly, with the uprisings in Libya, the Libyan authorities were not able and willing anymore to live up to the partnership agreements (Sengupta 2011).

As noted, Libya had been working closely with Europe and especially with Italy, in order to control borders and regulated and restrain the irregular migration of Sub Saharan Africans and North Africans to Europe (Hamood 2008). Gaddafi used oil and migration issues as tools to control its partnership with the EU. In the wake of the unexpected (United Nations) UN security Council resolution and subsequent attacks by British, French and American forces, Gaddafi announced that he would stop cooperation with Europe in stemming irregular migration from Libya. Moreover, he threatened that if the Europeans continued to support the protesters, he would open the migration floodgates and would send boats filled with migrants from north Africa and Sub-Saharan Africa to the European coasts. This message was confirmed by Libyan officials admitting they were not allowed to prevent African migrants from crossing the Mediterranean Sea (Sengupta 2011). Gaddafi even commenced to encourage people smugglers to transport even more people as a revenge for European countries backing the rebels and NATO bombing his forces. The result was that even more people were shipped across the Mediterranean in ‘leaky boats and the resultant tragedy of dozens of dead bodies washing up on Europe's southern shores’ (Sengupta 2011). Those still left in Libya are trapped in camps and terrified of prosecution by the rebels who might accuse them of being supporters of the old regime.

An increasing number of deaths of migrants crossing the Mediterranean Sea and an increasing pressure at Italy’s formal detention centres, Reception Centres for Asylum Aeekers (CARAs) and centres for identification and expulsion (CIEs), scared the Italian authorities who called the state of emergency. On the 24th of February 2011 at the meeting in Brussels of the Council of Justice and Home Affairs (JHA) (Sengupta 2011). Italian Minister of Interior Roberto Maroni called on Europe to take ‘all measures necessary to cope with a catastrophic humanitarian crisis’. He expected an ‘invasion of one million, one million and half people

who would put any country on their knees.' (Maroni 2011a). Other EU member states were not impressed by the potential humanitarian crisis and eventually made 25 million euro's extra available to deal with the large streams of refugees.

Even before the government was overthrown, on the 17th of June 2011 Italy reached a readmission agreement with the head of Libya's interim rebel government after recognizing it as the country's legitimate authority. In a conference in Naples the Italian Minister of Foreign Affairs Franco Frattini stated that 'This accord shows how close the collaboration is between Italy and the National Transitional Council (NTC) (...) and how serious the NTC considers cooperation with countries that have recognised it,' (Frattini 2011a). ASGI criticized the agreement on several points. Firstly, according to them the text was not disclosed to the public. Second, the agreement was made with a governing party that was not in command of the entire country and thus representing the full population. Thirdly, Libya had never signed the Geneva Convention protecting refugees, making the situation even more questionable. Fourthly, at the moment the agreement was signed, Libya was no 'safe haven' as military operations were still ongoing (Meccanico 2012:4).

4.1.4. Findings

The objective of partnership agreements was to prevent illegal migrants from arriving on EU territory and to provide a better treatment to migrants who eventually arrived on European soil. This, however, had a disturbing downside: police cooperation and maritime cooperation deterred people while fleeing to Europe from arriving. Partnership agreements clearly were not able to protect refugees prior to the Arab Spring. In excess, migrants that did arrive on European territory had the chance to be sent back to Libya, where no rules of protection or care applied to them and where they had the risk to be imprisoned in detention centres or send back to their home country irrespective of the danger for their lives.

Did more cooperation between the EU and third countries on controlling migration result in an inability of the EU to protect refugees? The analysis shows that the partnership agreements with Libya were problematic prior to the Arab Spring. Moreover it shows that when partnerships are agreed upon with a country that does not recognize human rights and that does not differentiate between migrants and refugees, migrants are mistreated, and on a random basis send back to their country of origin, that it is irresponsible to prevent those in

need, by police and maritime agreements from travelling to Europe or sent people back irrespective of their right on safety in the transit country.

During the Arab Spring more negative characteristics of partnership agreements came to light. Firstly, the EU and Italy especially, had to face their dependence on partnership agreements. Without the maritime and police cooperation Italy was clearly unprepared for the greater number of arriving migrants. Moreover, Libya is not a reliable democratic partner but is rather referred to as a 'rogue' state. Gaddafi took revenge and threatened to send even more people by vessels to Europe. The partnerships are based on soft law meaning that they are unbinding and can be annulled at every point in time.

In order to control the flows of migrants caused by the uprisings in the Arab world, Italy attempted to re-establish the readmission agreements with the new regimes in Tunisia and Libya. By declaring a state of emergency they justified derogating important laws like asylum procedures and used the fast-track application process. Calling for a state of emergency[19] is an excessive measure when looking at the number of migrants and reasons justifying this. To date no check and balances system or democratic accountability mechanism is valid the EU. However this state of emergency has not been that exceptional as according to scholar Yasha Maccanico Italy declared a state of emergency several times before. [20] The structural calling of a state of emergency has been taken too lightly and has severe implications for the treatment of migrants (Mecanico 2012).

Partnership agreements, also when justifying them by calling a state of emergency, undermine the non-refoulement procedure. This procedures stipulates that no state 'shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened'. Preventing migrants from arriving on European territory or sending them back without having a full asylum procedure infringes this principle. Moreover, during the Arab Spring migrants, most of them of African background, were send back despite the

19 Art. 15 of the ECHR: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law' (Apap and Carrera 2003:403).

[20] On December, 11 2002, November 7, 2003, December 23, 2007, February 14, 2008, July 25and November 19 , 2009 (Maccanico 2012).

knowledge that there was a witch-hunt for this group of people being accused of serving the mercenary army of Gaddafi (Meccanico 2012).

The objective was to deter illegal migrants from arriving on European soil and to protect those in need. However partnership agreements were made with states where migrants are not safe or protected, or faced the possibility to be sent back to their country of origin irrespective of their safety. Despite this knowledge, and without the right mechanisms to protect those in need of protection, partnership agreements with these kind of states were growing in number. The greater this number, the more difficult it became to protect those in need.

4.2 European border policy at sea

Having discussed the aspects of European border policy in third countries and its effects on the protection of refugees and migrants, I will now shed light on the operational practices of EU border policy in the Mediterranean Sea. The importance of the Mediterranean in the EU border policy can be deducted from the fact that in 2011 86percent of the detections of irregular migrants occurred on the EU's external borders of which 46percent took place in the Central Mediterranean and Eastern Mediterranean Sea (Frontex 2012). In this section, I will test the operations of the EU border policy at sea by using the capability-expectations gap. This section begins by pointing out the main aims and instruments of the EU border policy at sea. Then I will focus on the implementation by member states of EU mechanisms to protect refugees at sea and the EU's main maritime border policy instrument, Frontex. Finally, I will show whether Frontex was able to protect refugees during the Arab Spring.

In this section I argue that the initial aim of border patrols in the Mediterranean which set out to prevent the arrival of irregular migration, (Frontex 2012a) does not reflect the principle of non-refoulement. The foundation upon which sea border regulation was built proved to be weak, all regulation founded on this base will be similarly weak. Therefore an increase in the number of regulations in the past served only to widen the gap between what the policy was expected to achieve and what could be realised in terms of refugee protection. The guiding hypothesis for this section will be:

Hypothesis III: the more border controls at sea, the less effective EU refugee protection.

4.2.1. Objectives and legal base

A strong legal base is essential for any good policy. If a legal base if weak, all regulation founded on this base will be similarly weak. Foundational aims are important as they give an insight into the purpose of the instruments. Both can explain why expectations were not fulfilled.

The Dutch jurist Hugo Grotius (1916) noted in 1609 in his Mare Liberum that the high seas cannot be subject to national jurisdiction and can only be governed by residual principle of freedom allowing vessels of all nations the right of passage, trade and exploitations. However together with this freedom, a legal duty to render assistance to those in need of protection at sea was also established (Grotius 1916:1).

The EU however has created regulations enabling sea patrols which primarily serve to prevent illegal migrants from reaching EU territory. From the 1990s onwards along with strengthening the freedom of movement within the EU for its citizens, restrictions were augmented on the entry of non-European migrants. As a result, migrants have increasingly tried to enter EU territory via illegal sea routes. EU policies and instruments aiming to halt this clandestine migration have succeeded in some areas. However, EU policies have sparked a splintering of migrants routes throughout the Mediterranean, causing an increase in dangerous points of passage (Bigo and Guild 2005:143).

Along with the increase of sea border regulation, a division of responsibilities seemed necessary (Gammeltoft-Hansen and Aalberts 2010:7-8). As noted, EU law is subject to international law and therefore the EU had to implement Search and Rescue (SAR) zones. This Convention aims to create an international system for coordinating rescue operations and guaranteeing their efficiency and safety. Each member state has the responsibility over a different maritime area. Additionally and in line with the 1951 Geneva Convention, the Convention stipulates that states are not only obliged to rescue people in need of protection, they also have a duty to disembark rescued persons in a safe place (Trevisanut 2010:524).

Coastal states have a prime responsibility in securing the EU border. They have ‘to ensure arrangements for distress communication and coordination in their area of responsibility and for the rescue of persons in distress at sea around their coasts’ (Heller et al. 2012:26). Aware that Mediterranean states have their own policy regarding sea patrols, the EU has created

several agencies[21] to manage SAR operations. Among these, two were given the task to combat human trafficking; Europol and Frontex. Europol is the main institution focused on the gathering of intelligence while Frontex coordinates sea patrols.

The Frontex Agency was set up in 2004 and became operational in 2005. Its primary responsibility is to coordinate joint operations of member states with the aim to prevent the arrival of irregular migrants. In these operations the equipment is equally provided by member states of the EU. However Frontex neither has a protection mandate nor particular human rights expertise (Simone 2010). I will focus on migrants arriving via the Central Mediterranean route as this route provided the highest number of irregular migrant arrivals in 2011 (Frontex 2012).

To summarize, the legal basis was not weak as such as there was a legal duty to render assistance to those in need of protection at sea. The SAR zones had the aim to simplify sea patrols for countries and Frontex had to coordinate the actions of member states, which would in theory increase refugee protection. However, the foundational aims of Frontex and border policy at sea in general, were also controversial as they were focused on preventing and tackling immigration. Therefore it depends on the implementation of these regulations and the ability to separate those in need of protection from economic migrants to see whether the instruments were capable of protecting refugees.

4.2.1 IMPLEMENTATION

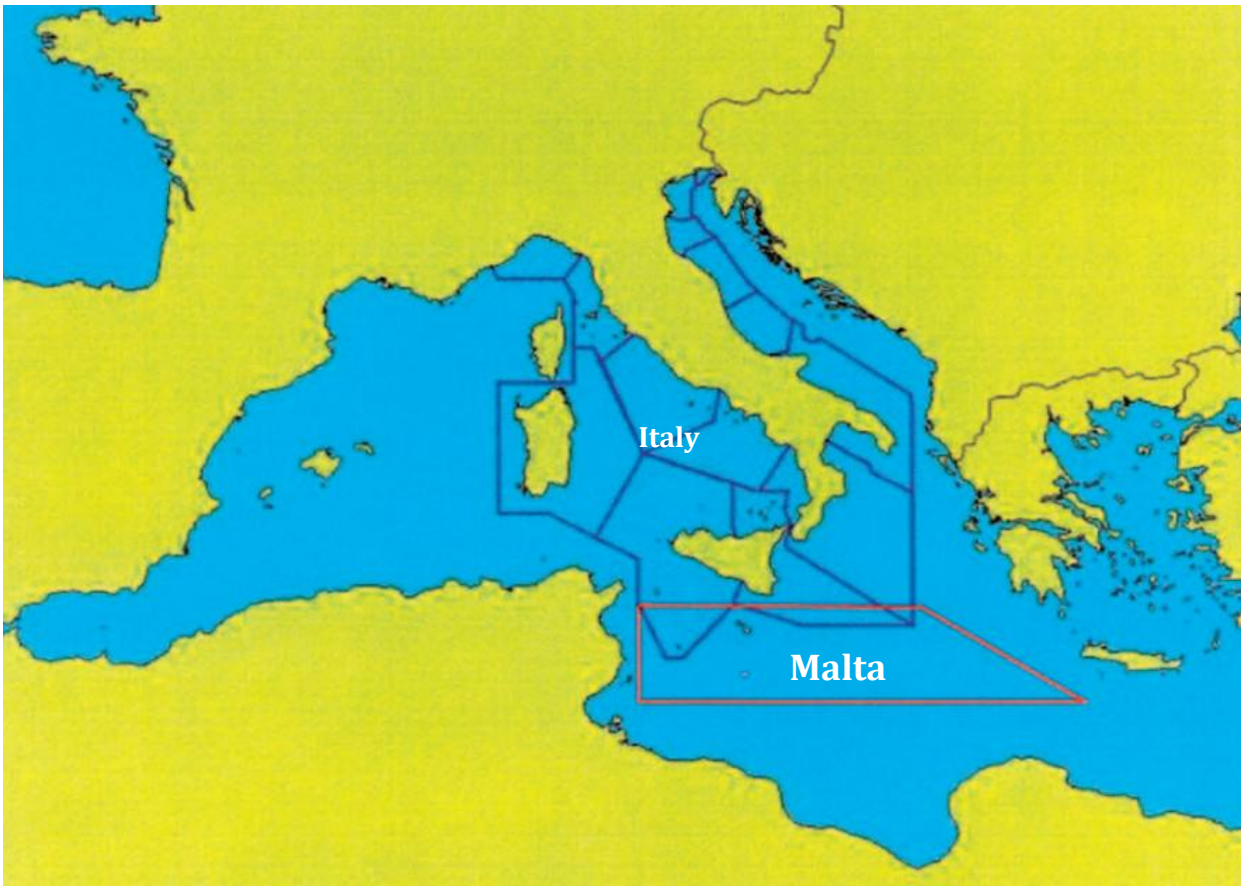
Effective implementation of the instruments is necessary as otherwise the realisation of their objectives will be hindered. Both the materialization of instruments for coastal states and of the instruments deployed by Frontex, appeared to be a complex matter. To commence, there seems to be little clarity on the responsibilities of member states in their SAR zones. Italy and Malta for example, have been locked in continuous dispute since they signed different versions of the SAR convention (see Figure 2). Italy has signed the amendments of the SAR convention in 2004 stipulating that migrants should be disembarked on the territory of the SAR zone where the vessel was found. The SAR zone of Malta is 750 times larger than its territory and Malta has therefore refused to ‘ratify these amendments for fears that it would

[21] EMSA (European Maritime Safety Agency), Frontex, EPN (European Patrol Network); ERA-NET (European Research Area Network), EU LRIT DC (EU Long Range Identification and Tracking Data Centre; SafeSeaNet (European vessel traffic monitoring and information system) (Trevisanut 2010: 537).

impose unrealistic obligations to disembark migrants rescued by other states and private vessels' (Heller et al. 2012:9). Consequently, it still acts in accordance with the old regulation that rescued persons should be disembarked on the territory of the nationality of the ship.

This provoked a series of incidents where migrants were rescued in Malta's SAR zone but closer to the Italian islands Lampedusa and Pantelleria. This brought about a lengthy conflict during which migrants have died. A number of confrontations between Italian and Maltese naval vessels 'literally trying to block each other from entering its territorial waters and disembark rescued migrants' (Gammeltoft-Hansen and Aalberts 2010). In other words, the lack of clarity of this provision has caused the lives of those in need of protection.

Figure 2



Italian and Maltese SAR Zones (Caffio 2007:143)

What were the tools of Frontex to employ their tasks? One of its tools was the ability to create joint maritime operations with member states such as operations Hera I, II, and III. The aim of these operations was to reduce the number of vessels arriving in Spain's Canary Island (Frontex 2012). The operations were a success in term of achieving the goal of a significant

decrease in boats arriving on European territory. Notably, perhaps unintentionally, this has also prevented migrants- including refugees- to make use of the procedural rights that apply within EU territory (HRW 2011). The regulations for Rapid Border Intervention Teams (RABITs) supplemented the tools of Frontex in July 2007. This tool of Frontex endeavoured to stop the arrival of migrants. Furthermore it stated that 'while performing their tasks and exercising their powers, members of the teams shall be authorised to use force' (Frontex 2007).

In 2008, the Standing Committee of the United Nations High Commisoner for Refugees (UNHCR) argues in a statement that the EU used Frontex as a deterrence campaign in which 'intentionally or not - asylum seekers are being blocked from claiming protection under the 1951 Refugee Convention' (ICVH 2008). This statement called upon the EC to strengthen regulation in order to identify those in need of protection and more specific to grant them the right to use this protection. In addition the UNHCR report stressed that it agreed with the enforcement focus to prevent illegal immigration, but that at least as much attention should be given to the protection of refugees and migrants in need of protection (ICVH 2008). In other words, Frontex fulfilled its tasks to prevent migrants from reaching EU territory but was unable to simultaneously provide protection to migrants. To overcome these problems the EC granted Frontex more responsibility. In the Council Decision of April 26, 2010 the EC supplemented Frontex' tasks with the surveillance of the maritime external borders (EC 2010b).

4.2.3. The Arab Spring

The collapse of the Tunisian and Libyan regimes instigated a temporary crisis in migration patterns from North Africa, with an increase in the number of migrants attempting to cross the Mediterranean into Europe and an increase in the number of migrants losing their lives in this attempt. According to the UNHCR 2011 was the 'deathliest year' in the Mediterranean since 2006 with an estimation of over 1500 migrants death (Heller et al. 2012:9). During the Arab Spring, ships of Frontex and EU member states were not the only vessels surveying the Mediterranean for migrants. NATO ships were also patrolling. However, they were not able to protect refugees. Yet, is it to blame on the increase in tasks and responsibilities given to Frontex and the already weak SAR system? First, this section will lay down the reaction to the flow of migrants stemming from the uprising in the Arab world and then it will use the 'Left-to-Die Boat Case' to see whether these EU instruments were able to protect migrants.

At request of the Italian government and as a response to these challenges posed, the EU launched the Frontex Joint Operation Hermes Extension 2011 on the 20th of February. This operation was aimed at assisting Italian authorities in handling the ongoing and upcoming flows of migrants (Frontex 2011a). Frontex main responsibilities were to patrol the Mediterranean area, to prevent border crossings, to gather information necessary for analysis, aid in the identification of migrants, and to predict and prevent the possibility of criminal activities at the EU's external borders. Later, it also included support for return operations of migrants to their countries of origin. The operation was placed under the guidance of Italy, and marine equipment and crews were provided by the Italian authorities. Equally, RABIT, which for the first time ever provided border management support at the Greece-Turkey land border, contributed to a reduction of 75percent in the number of irregular crossings during its deployment.

As noted 1.500 migrants had died at sea and it remains unclear whether their lives could have been saved. To date, one situation, alternatively called the 'left-to-die boat case' has been investigated. A vessel with 72 migrants was on its way from Tripoli to Lampedusa when it started to experience difficulties caused by a lack of fuel, food and water supplies on March 27 2011 (Heller et al. 2012:9). The captain of the vessel contacted a priest in Italy who rapidly alarmed the Coast Guard. In the mean time Spanish and Italian military were within reach of the vessel. Yet, neither of them mobilized to rescue the migrants and 63 migrants died before they arrived back in Libya two weeks after departure. Italian authorities say that they fulfilled their obligations and were not obliged to do more. Maltese authorities confirm they received information of the call, but say that Italy made no requests for assistance. Thus a lack of clarity in responsibilities, caused the inability of EU member states to protect refugees. Furthermore, fishermen and other private ship masters were too afraid to rescue migrants in the fear of being criminalized if they help small boast in distress as transporting illegal migrants is the Italian governmentof the vessel in distress. In November 2011 Frontex wrote a response letter after a request by several NGO's explaining the scope and location of its mission. Frontex provided the coordination of the operational area. The information given in the letter states that the trajectory of the 'Left-to-Die Boat Case' never entered any of Frontex's operational areas (Heller et al. 2012:27). Moreover the actual deployment of equipment by Frontex was mainly delivered by Italy and only minimal equipment was provided by other member states.

A lack of clarity on responsibility added by a lack of accountability of the parties involved resulted in the death of 63 people. This tells us that the past two decades of European anti-immigration policies have 'left their mark on how search and rescue operations are carried out in the Mediterranean, and have needlessly put at serious risk the lives of hundreds of migrants' (Heller et al. 2012:9).

4.2.4. FINDINGS

The legal basis of sea border policy was not weak as there was a legal duty to render assistance to those in need of protection at sea. The SAR zones had the aim to simplify sea patrols for countries and Frontex had to coordinate the actions of member states, which would in theory increase refugee protection. Yet, there exists some controversy on the foundational aims of Frontex, and on border policy at sea in general. Both were focused on preventing and tackling immigration. Even though member states may claim that preventing the loss of life in the Mediterranean is one of the key elements of anti-immigration policy, results suggests that lives of migrants were put at risk. Securing member states against illegal migrants and giving protection to those in need before reaching the actual border is controversial.

This controversy becomes clear when looking at the implementation. Protection of refugees could not be guaranteed because of two main reasons. Firstly, the determination of the place to which rescued persons should have been escorted under the arrangements stipulated in the SAR Convention were unclear. Malta and Italy both claimed not to be responsible for the migrants dying in the 'Left-to-Die Boat Case' during the Arab Spring. The first conclusion that can be drawn from this is that the SAR convention is too weak to protect refugees as a result of the fact that it possible for countries to be signatories of different SAR conventions, and because of a lack of accountability and oversight.

Secondly, since its creation, Frontex has tried to provide a framework for member states to cooperate with each other, diminishing the number of irregular migrants significantly. Nonetheless, prior as well as during the Arab Spring the operational cooperation proved to be inefficient and insufficient. As noted Frontex does not have any human right expertise or protection mandate. The added value of Frontex regarding human rights policy is thus limited (Koenig 2011:7). The operational solidarity proved to be inadequate during the Arab Spring. This is well illustrated by the actual deployment of equipment which was mainly delivered by

Italy. Furthermore, there are unclear and insufficient legal provisions to guide Frontex in its tasks to protect refugees. It was assumed that Frontex would be capable of rescuing refugees when capable or at least coordinating the rescue of the vessel in distress. Yet Frontex claimed non-responsibility as the vessel had never entered its operational area. Too little tools, both in legal provision and in equipment, have been given by the EU to Fontex in order to perform its tasks to protect refugees. This makes Frontex a weak instrument in terms of refugee protection, unable to live up to the expectations of member states to protect refugees.

CONCLUSION

Since 1951 refugees are protected under the Geneva Convention. The EU supplemented and specified the rights of refugees in its own legal order. However, a diminishing number of individuals in search of protection seemed to find refuge in Europe. Even more distressing was that 2011 was the deadliest year in terms of migrants dying on their journey to Europe. Scholars tell us that the corrosion of refugee protection has been caused by the securitization of migration. The aim of this securitization process was to prevent illegal migrants to enter European territory. Refugee protection was not supplemented with this increase of border security and as a consequence the refugee protection mechanism failed to fulfil its task.

I have argued that the EU was near-sighted in the creation of border policy instruments, focusing on securing the border against illegal migration while leaving little attention for the protection of refugees. This led to an ineffective and insufficient refugee protection mechanism. I have shown this by testing the strengths and weaknesses of instruments aiming to protect refugees. By looking into instruments of European border policy aiming to protect refugees, this analysis has shown to what extent the objectives and regulations were able to protect refugees effectively.

In this analysis, the Arab Spring played an important role as a means to illustrate the argument. I have used the influx of migrants as a result of the Arab Spring to highlight the weaknesses of the system. For reasons of simplification I have divided the instruments between internal and external border policy instruments.

The instruments of internal border policy are the burden sharing principle and the reception standard. The analysis showed that the burden sharing principle – consisting of the solidarity principle and the principle of fair sharing of responsibility – are not effective because they are not implemented in effective tools to bring countries to pledge for asylum seekers.

To start, the expectations of the burden sharing principle were different among northern states compared to southern states. These expectations could be different because implementation guidelines were lacking. Partly because of unfavourable economic and political conditions, the northern member states were not willing to implement the solidarity principle. Southern

states on the other hand were incapable to rely on their Northern counterparts when the situation became critical. This gap between willingness and expectations affected the trust between EU member states. This gap is caused by a lack of structures to enforce principles and by a lack of guidelines to implement these principles into national law. The gap makes the principle ineffective, significantly increases the pressure on EU border states and leads to the creation of external border policy instruments. The ineffectiveness of the burden sharing principle decreased the capability to protect refugees.

Reception standards have been articulated in EU law to guarantee refugee protection upon arrival and during the stay of migrants in the EU. The expectations of a CEAP and especially the detailed reception directive should have provided refugee protection within the borders of the EU. The analysis showed that prior to the Arab Spring reports had articulated the mal-implementation or non-implementation of the legal provisions by member states. In the following years hardly any improvements were made, probably because of the significant decrease in the arrival of migrants as a result of the third country partnerships. The Arab Spring highlighted this weakness and showed that especially EU border countries were unprepared for the influx of migrants.

External border security instruments consist of third country partnerships and border security at sea. The objective of third country partnerships was to deter illegal migrants from arriving in Europe while protecting refugees. The analysis shows that the agreements do not comply with the non-refoulement principle. Preventing migrants from arriving on European territory or sending them back without granting them a full asylum procedure infringes this principle. Moreover, partnership agreements were made with states without safe conditions for migrants. Despite this knowledge partnership agreements with these kinds of states were growing in number. The greater this number, the more difficult it became to protect refugees. By impeding refugees to even start the procedure of asylum request, the partnership agreements are in breach of the Geneva Convention.

The analysis concerning border policy at seas was conducted by looking into two tools of border policy: the supervision of SAR zones by coastal states and the tasks and tools of the border agency Frontex. Concerning the supervision of SAR zones, the analysis suggests that the legal basis, in principle, was not weak as there was a legal duty to render assistance to those in need of protection at sea. However, the objective of this border policy, as stated in

official documents, is to secure member states against illegal migrants. The regulations of the SAR Convention proved to be too weak to protect refugees. I concluded that this is the result of the fact that it was possible for countries to be signatories of different SAR conventions, and because of a lack of accountability and oversight. Concerning Frontex, too little tools, both in legal provisions and in equipment, had been given by the EU to the agency in order to perform its task to protect refugees. This makes Frontex a weak instrument in terms of refugee protection, unable to live up to the obligation of member states to protect refugees. Border policy at sea was thus not effective in protecting refugees as the initial aim and outcome was more to prevent migrants from arriving in Europe.

When drawing the bigger picture it becomes clear that the various instruments cannot be studied separately because they are interlinked. If the principle of burden sharing would be effective and all the asylum seekers would be divided over 27 member states, it would relieve bordering states of the burden of responsibility for such a large amount of migrants. It would also diminish the weight on reception facilities and lower the chance that countries like Italy during the Arab Spring would perish under the burden and seek for alternative solutions like third country agreements.

Moreover, a clear link between external border policies and reception standards is visible. In the two years prior to the Arab Spring both third country partnerships and border control by Frontex decreased the number of incoming migrants significantly. This resulted in the underpreparedness of EU countries when the governments of Arab countries - and simultaneously the partnerships - collapsed. Frontex had too little tools with which to coordinate surveillance of the sea and the differences in versions of the SAR Convention led to the inability to protect refugees when it was most needed. The strong instruments created to stop illegal migrants coming to the EU needed an upgrading of instruments to protect those in need of asylum. The existing instruments have proved to be too weak to protect refugees.

The analysis shows that the balance between securitisation and refugee protection is uneven because the upgrading of refugee protection has been neglected. I call this the near-sighted attitude of European border security, focusing more on securing the border against illegal migration than on the protection of refugees, resulting in an inability to protect refugees on an international and European level. This was highlighted by the case of the Arab Spring.

The gap between capabilities and expectations has been widened by the critical political and economic situation in Europe. Eventually this could lead to the dismantling of the Schengen zone. On the 8th of June 2012, EU countries have given themselves more freedom to reinstall border controls (Nielsen 2012). It is questionable whether this process of dismantling Schengen zone can be reversed. Thus weak European border instruments do not only affect refugee protection it will also modify the free movement of people and goods, and fragmentise the unity that the EU proclaims.

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